No. 80-5643

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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EDWARD FRANK SNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 627 F.2d 186. Two earlier court of appeals opinions are reported at 550 F.2d 515 and 592 F.2d 1083.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution for attempted bank robbery following conviction for attempted extortion and conspiracy to commit bank robbery.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner and co-defendant Erwin Schmidt were convicted of attempted extortion affecting interstate commerce, in violation of 18 U.S.C. 1951, and conspiracy to rob a federally-insured bank, in violation of 18 U.S.C 371 and 2113(a). Petitioner was sentenced to 20 years' imprisonment on the extortion count and five years' imprisonment on the conspiracy count, the terms to run concurrently.

Briefly summarized, the evidence at trial showed that petitioner, Schmidt, and an unindicted co-conspirator attempted to extort $150,000 from a bank in Hayward, California, by devising a plan to kidnap the bank manager's wife and to accompany the manager to the bank in order to obtain the ransom money. The conspirators agreed that the bank manager would be murdered after the ransom had been paid. Petitioner and his cohorts went to the bank manager's house on December 11, 1975, in an attempt to implement the plan, but their scheme was thwarted when the bank manager's wife answered the door with a large and unfriendly dog at her side. United States v. Snell, 550 F.2d 515, 517 (9th Cir. 1977).

On appeal, the court of appeals affirmed the conspiracy convictions but reversed the attempted extortion convictions. The court held that the proof at trial would have supported a charge of attempted bank robbery and that "the bank robbery statute provides the exclusive remedy for conduct within its coverage." United States v. Snell, supra, 550 F.2d at 518.

On remand, petitioner and Schmidt were indicted for attempted bank robbery, in violation of 18 U.S.C. 2113(a).[1/] On petitioner's motion, the district court dismissed the indictment on the ground that retrial for the offense would violate the Double Jeopardy and Due Process Clauses. The government appealed this ruling, and the court of appeals reversed. 592 F.2d 1083. This Court denied certiorari. 442 U.S. 994(1979).

On remand, petitioner waived a jury trial and the case was submitted on the record of the first trial. The district court found petitioner guilty of attempted bank robbery, and the court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 5-7) that the Double Jeopardy Clause prohibits his prosecution for attempted bank robbery following his convictions of conspiracy to commit bank robbery and attempted extortion, because all three offenses arose out of the same criminal transaction. The court of appeals correctly rejected these claims, as it had done previously on petitioner's pretrial appeal. See 592 F.2d 1083.

1. Petitioner's prosecution for attempted bank robbery following his conviction for conspiracy to commit bank robbery does not violate the Double Jeopardy Clause because attempted bank robbery and conspiracy do not constitute the "same offense"

1/ On April 14, 1978, the Assistant Attorney General, pursuant to the Department of Justice's Petite policy (see Rinaldi v. United States, 434 U.S. 22 (1978)), granted authority to the United States Attorney for the Northern District of California to pursue the second prosecution.

for double jeopardy purposes. The classic test for determining whether two separately defined crimes constitute the same offense is whether each provision requires proof of a fact that the other does not. Brown v. Ohio, 432 U.S. 161, 166 (1977); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); Blockburger v. United States, 284 U.S. 299, 304 (1931).

The court below properly concluded that the Blockburger test was satisfied here: conspiracy requires proof of a criminal agreement, whereas attempted bank robbery (which can be committed by a single defendant) does not; attempted bank robbery, on the other hand, requires proof of acts "tending toward the accomplishment [of a bank robbery] and done in part execution of the design to commit a crime, exceeding an intent but falling short of an execution of it" (United States v. Bussey, 507 F.2d 1096, 1097 (9th Cir. 1973)), whereas conspiracy merely requires proof of an agreement plus a single overt act, which may actually do little to advance the scheme to rob the bank. See Brinkley v. United States, 560 F.2d 871, 874 (8th Cir.), cert. denied, 434 U.S. 931 (1977), upholding convictions for both attempted bank robbery and conspiracy to commit bank robbery.

2. Nor does the fact that petitioner was prosecuted for attempted bank robbery following the reversal of his conviction of attempted extortion offend the Double Jeopardy Clause. Retrial is of course permissible when a conviction has been reversed on grounds that do not implicate the sufficiency of the evidence. Burks v. United States, 437 U.S. 1, 15 (1978); Greene v. Massey, 437 U.S. 19, 26 (1978); United States v. Tateo, 337

U.S. 463, 465 (1964). The fact that the government chose on remand to prosecute petitioner for attempted bank robbery rather than to reprosecute him for attempted extortion is of no consequence. As this Court held in United States v. Ewell, 383 U.S. 116, 124-125 (1966), when a defendant's conviction is reversed and the case remanded for retrial, the government is free to prosecute for the same offense or for a different offense arising out of the same transaction. Accord, United States v. Poll, 538 F.2d 846, 847 (9th Cir.), cert. denied, 429 U.S. 977 (1976). The United States Attorney's decision to proceed under the attempted bank robbery statute was plainly legitimate here since that was the statute the court of appeals had held to be the exclusive remedy for petitioner's undeniably criminal acts.2/

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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2/ More recently, the Ninth Circuit, relying on this Court's intervening decision in United States v. Culbert, 435 U.S. 371 (1978), has overruled its decision in the first Snell case and held that conduct such as petitioner's may be prosecuted under either the bank robbery statute or the Hobbs Act. United States v. LaBinia, 614 F.2d 1207 (1980).